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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of the Secretary

In the Matter of )

Amendment of Rules Governing )  
Procedures to Be Followed )  
When Formal Complaints Are )  
Filed Against Common Carriers )

CC Docket No. 92-26

COMMENTS  
OF THE  
FEDERAL COMMUNICATIONS BAR ASSOCIATION

The Federal Communications Bar Association ("FCBA" or "Association") hereby submits its Comments to the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding. The FCBA, consisting of approximately 1800 attorneys, is the foremost professional organization involved in the development, interpretation and practice of communications law and policy. These Comments were prepared by members of the FCBA's Common Carrier Practice Committee and have been reviewed and approved by the FCBA Executive Committee.<sup>1/</sup>

<sup>1/</sup> Although FCC employees constitute a substantial portion of the FCBA membership and are represented on the Executive Committee, no FCC employees participated in the preparation of these Comments or in their consideration by the Executive Committee.

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## **I. INTRODUCTION**

By Notice of Proposed Rulemaking, the Commission has solicited comments on proposed changes to its rules regarding procedures applied to formal complaints against common carriers. See Notice of Proposed Rulemaking, released March 12, 1992, FCC 92-59 ("NPRM"). These rule changes are intended to facilitate timelier resolution of formal complaints by eliminating certain procedures and pleading requirements.

The FCBA applauds the Commission's intention and its recognition that the complaint process has become an important tool in resolving pricing and other disputes between customers and common carriers. Increasing reliance on the complaint process is a critical aspect of the Commission's overall policies toward the regulation of common carriage. As the pace of deregulation continues and the complaint process assumes an even more important role in assuring compliance with the Communications Act and the Commission's rules, it is essential that that process not sacrifice fairness in an effort to achieve expedition. The Association is concerned that many of the proposed rules, if adopted in their present form, would not achieve the goal of expedition and would frustrate the fair resolution of disputes.

In these Comments, the FCBA will discuss each of the Commission's key proposals as they appear in the NPRM.

## **II. PLEADINGS**

**A. Answers.** The Commission proposes to reduce the time to file an answer to a complaint from 30 to 20 days. As a general matter, the Association is concerned that shortened time periods for filing of pleadings will not result in more expeditious resolution of complaints. The lengthy delays do not appear to stem from the time periods for filing pleadings. Rather, lengthy delays occur after the pleading cycle has been completed.

Further, we are particularly concerned that allowing only 20 days to answer a complaint will impair the ability of defendants to prepare an adequate defense. Frequently, defendants have no knowledge that a complaint will be filed until they are served and they must investigate the allegations before they are in a position to prepare an answer. Since complaints can rest on actions that are two years old (or, in some cases, older) the investigation can be a complex, difficult and time-consuming effort. Often individuals with knowledge of the claims have left the company or moved to different positions, and files and other records are not readily accessible. In these circumstances, twenty days is

simply not an adequate period of time to complete the investigation and prepare an answer.<sup>2/</sup>

Further, the FCBA believes that shortening the time in which to answer a complaint will materially increase the likelihood that defendants will ask for an extension of time or leave to file an amended answer. Inadequate periods of time to prepare pleadings leads to such requests which only create additional burdens on the Commission staff.

**B. Briefs.** The Commission proposes to impose time limits on the filing of briefs. The present rules set no specific timetable, but the staff, in requesting briefs, establishes the timing of submissions. The FCBA believes the existing method is preferable to a rigid requirement for timing of submissions. The Commission staff can, in setting the deadlines, take into consideration the complexity of the issues to be briefed, the amount of discovery and other matters affecting timing. Depriving the staff of the flexibility it presently enjoys may result in incomplete and unhelpful submissions. It may be the intention of the Commission to continue to allow some flexibility in the timing of

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<sup>2/</sup> In cases such as overearnings complaints, where the staff has held that the cause of action does not accrue until the local exchange carrier files its final rate of return report, the complaint can actually cover claims going back over four years.

submissions, see NPRM at ¶. 9, but the proposed rule suggests flexibility is available only with regard to the length of briefs, see Proposed Rule § 1.732.

The Commission also proposes that, generally, reply briefs may be filed only in cases where discovery has been conducted. The unstated assumption underlying this suggestion is that reply briefs are only likely to be necessary in complex factual cases where discovery was necessary. While the FCBA acknowledges that unnecessary pleadings burden the staff and delay the process, it questions the accuracy of the underlying assumption and thus whether the proposal will expedite the process. Detailed factual cases often require reply briefs to allow full exposition of the issues, but complex legal theories are equally as likely to require responsive pleadings. Thus, denying parties the opportunity to file replies could impair a complainant's ability to set forth the legal theory on which its complaint rests.

Moreover, by limiting the complainant's ability to set forth its full legal position, the proposal encourages the filing of petitions for leave to file replies or petitions for reconsideration. Both will place additional burdens on the parties and the staff, and further delay resolution of complaints. Accordingly, the FCBA suggests that the Commission allow complainants to file reply briefs where they believe they are necessary.

C. **Replies.** The Commission proposes to eliminate replies to answers except in response to "affirmative defenses that are factually different from any denials also contained in the answer." This proposal will not reduce the number of replies filed, as is intended, but will instead create incentives for attorneys to respond to all arguments made in every answer. In many cases it may be difficult for a complainant to define a bright line between an affirmative defense and a denial. It will not matter how these are styled since one may be a paraphrase of the other. Rather than risk admission of an affirmative defense, complainants will file replies, notwithstanding the Commission's desire to avoid superfluous pleadings. Therefore the FCBA believes the filing of replies should be permissive without requiring complainants to decide whether an answer contains denials or defenses or both.

D. **Motions.** The Commission proposes to limit the filing of motions so that no motions may be filed until the time for the answer is due. In addition, it suggests that replies to oppositions to motions should be disallowed. With one exception relating to motions to make more definite and certain, the FCBA supports these suggestions. As a general rule, substantive motions and answers can be filed simultaneously without any prejudice to the interests of the defendant, and, indeed, the simultaneous filing of answers and substantive motions will put the defendant's complete position

before the Commission at one time. Such an approach is thus likely to sharpen the issues for resolution and expedite the process.

Similarly, while there may be a few cases in which a reply to an opposition is required, replies should not be necessary in the vast preponderance of motions. The issues in motions tend to be limited and straightforward, and defendants should not need to reply for the issue to be properly joined and briefed. In fact, the opposition itself is in the nature of a reply, since it is the third pleading in the process, the motion being filed in response to the complaint. Further, by prohibiting replies, the Commission will be discouraging gamesmanship, since defendants will have to anticipate and refute potential defenses in their motions, rather than trying to set a trap for the complainant.

The one exception which the FCBA takes to this proposal relates to motions to make the complaint more definite and certain. That motion is designed to force complainants to define their charges more precisely and, to the extent such a motion has merit, its early filing will facilitate a definition of the issues. If the motion must be filed with the answer, defendants are likely to simply deny the unclear allegations of the complaint, since they are not certain what the complainant is alleging. If the motion is then granted, additional time will be required for defendants to file their answer.

Consequently, the FCBA recommends that the Commission require the filing of motions to make more definite and certain within a short period of time after the complaint is served. If the motion is granted, defendants should be given a short, additional period of time to file their answer. If it is denied, defendants can be required to file their answers within the originally allotted time for filing an answer or within a few business days of the order denying the motion, whichever is later.

E. **Fees.** The Commission proposes to make explicit and clarify the requirement that a fee accompany the filing of a formal complaint, as required by 47 C.F.R. § 1.1105(1)(c). The Association agrees that clarification of this matter is appropriate.

### III. **DISCOVERY**

A. **Preclusion.** The Commission requests comment, in Footnote 9 of the NPRM, on a rule precluding discovery, including interrogatories, absent a staff order. The FCBA opposes this proposal. In our judgment, it will serve to inhibit the development of facts necessary to resolve disputes, without significantly expediting the complaint process. The Commission's deregulatory policies have freed common carriers from many reporting requirements, giving the process of discovery in complaint proceedings added importance. This

proposal establishes a presumption against discovery in the very circumstances in which it might be most needed. To the extent the Commission fears unreasonably burdensome discovery requests -- "nuisance requests" -- other approaches can be developed to prevent this occurrence.

**B. Bifurcated Proceeding.** The Commission proposes to bifurcate formal complaint proceedings by permitting discovery on damage issues only after an initial finding of liability. The FCBA does not oppose this approach, but is concerned that it may not achieve the desired result without encouragement toward settlement from the Commission. Toward this end, we applaud the Commission's efforts to create a pilot project to explore the use of Alternative Dispute Resolution (ADR) procedures in formal complaint procedures. However, this process should be expedited and greater Commission enthusiasm for settlement should be evidenced.<sup>3/</sup> Otherwise, bifurcated proceedings will do no more than increase the administrative burden on the Commission.

**C. Timetable.** The Commission proposes to shorten the time available to initiate discovery so that requests for

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<sup>3/</sup> One method of achieving this end is the establishment of a mandatory conference with the Commission's staff in each proceeding to determine the usefulness of ADR to the particular pending matter.

discovery could only be served during the period from filing of the answer to 20 days thereafter. The FCBA does not object to this proposal, insofar as it considers discovery requests prepared by the complainant who has had up to two years to prepare its case. However, this proposal may inhibit a defendant's ability to formulate reasonable discovery requests. Whatever the relative benefits of shortening a complainant's time to initiate discovery, the critical problems in processing complaints do not appear to occur as delays in discovery or briefing, but rather are more often the result of inadequate staffing resources.

**D. Relevance.** The Commission suggests that it might preclude objections to discovery based on relevance. Under that proposal, the "refusal to answer an interrogatory or an objection based on relevance would be deemed an admission of allegations contained in the interrogatory." The Commission reasons that such an approach should not prejudice the parties since such "an admission would be relevant for the purposes of resolving the complaint . . . a respondent would likely have strong incentives to answer all arguably pertinent questions, yet presumably would not suffer for failing to answer a clearly irrelevant question."

The FCBA believes that this proposal is likely to complicate the discovery process and add to the number and variety of litigated issues. First, interrogatories typically

do not contain allegations which might be admitted by a claim that the interrogatory is irrelevant. Thus, the party seeking discovery will not gain anything by the proposal and will still be required to file a motion to compel. Alternatively, if this proposal is adopted, interrogatories will be written to contain factual allegations in order to gain whatever benefits this proposal might provide. Such a result would only further pervert the purpose of the discovery process.

Second, without a relevance limitation, discovery will become a fishing expedition, with inquiries extending far beyond the scope of the proceeding. Parties which are the subject of the discovery will either have to gather the information and provide it, or take the risk that, by not responding, the admission they will be making will not be prejudicial. Since the nature of the admission will not always be clear, the Commission will find itself resolving disputes as to the nature of the allegations admitted rather than whether the information sought is relevant to the dispute.<sup>4/</sup> The latter issues will be far easier to resolve than the former.

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<sup>4/</sup> The Commission should also consider the effect of this proposal on other proceedings, i.e., an "allegation" not relevant to one dispute may be relevant to another, even to a later-filed complaint.

If the Commission wishes to curtail objections based on relevancy, the FCBA suggests that it expressly adopt the standard employed under the Federal Rules of Civil Procedure and entertain relevancy objections only where the information requested is not relevant or is not likely to lead to the discovery of relevant information. This latter standard is broad and should reduce the number of relevancy objections.

**E. Confidential Treatment.** The Commission proposes to add rules to provide for confidential treatment of proprietary information. The FCBA supports this proposal and views it as one of the most productive aspects of the NPRM, one that is likely to promote both fairness and expedition. Perhaps the most time-consuming aspect of formal complaint proceedings is the negotiation of protective agreements. Establishment of rules, based appropriately on agreements that have been successful in protecting the rights of the parties, is likely to considerably shorten this aspect of the complaint process.

**F. Filing.** The Commission proposes that discovery results not be routinely filed with the Commission. Information deemed to be decisionally significant could be included in briefs, two versions of which (protected and non-protected) would be filed. The FCBA recognizes that the filing of two versions of briefs could add administrative inconvenience to the preparation of briefs, but, overall,

agrees that this proposal could help to eliminate confidentiality issues and could reduce the Commission's burden.

**G. Status Conferences.** The Commission proposals contemplate the continued use of status conferences to expedite the administration of formal complaints. The FCBA supports use of status conferences, which have proven to be an efficient and effective way of resolving disputes and expediting the process. The FCBA encourages the use of status conferences and suggests that the Commission expand their role in the resolution of discovery disputes, leading to a greater assurance of both fairness and expedition.

**H. Simultaneous Filing of Briefs.** The Commission has proposed the simultaneous filing of briefs by both complainants and defendants, and, where reply briefs are allowed, the simultaneous filing of these as well. The FCBA opposes this suggestion. This procedure may well shorten the pleading cycle, but the FCBA believes it will also complicate the process. Frequently, where briefs are filed simultaneously, the issues are not joined as effectively as where responsive briefs are filed. Parties can take very different positions in simultaneous briefs and rather than the parties coming together as to issues which need resolution, the briefs are like ships passing in the night. To the extent that occurs, the Commission's staff will not enjoy the full benefits of a well briefed case or the parties will attempt to file additional

pleadings in order better to join the issues. Neither result advances the Commission's goals of a prompt and fair resolution of complaints.

#### **IV. CONCLUSION**

The FCBA supports the Commission's efforts to make the formal complaint process more efficient without sacrificing the opportunity for equitable resolution of disputes. As discussed herein, some aspects of the Commission's proposals will help to achieve this goal. Others, however, are not likely to strike the appropriate balance between judicial fairness and administrative efficiency and should not be adopted. The FCBA recommends that the Commission consider ways to shorten the delays which occur after the conclusion of the pleading cycle, including the encouragement of ADR techniques.

Respectfully submitted,

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